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December 14, 2010

Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker

Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Dear Chairman Genachowski and Commissioners:

As the national organization for media arts organizations, the National Alliance for Media Arts and Culture (NAMAC) has a strong interest in the Federal Communications Commission's ongoing efforts to preserve the open Internet, promote universal broadband access, and protect consumers in a concentrated marketplace. We believe that preserving the Internet as a free and open platform is essential for democratic participation, commerce and innovation.

In NAMAC's recent Mapping of the Media Arts Field survey, 430 independent media organizations that included public, educational, and government access stations as well as community based media centers, reported creating over 285,000 programs annually that reach more than 33,000,000 viewers and listeners. Though many programs are created for radio and cable, 63% reported using the web as an additional distribution outlet. Limiting this work or relegating it to a non-prioritized tier does not carry Net Neutrality principles forward in the current wired or ever-expanding wireless environments.

We believe that the current order under review at the FCC, if adopted without substantial changes, will adversely affect how public institutions and nonprofit organizations may reach internet users with their content as well as stifle innovation that often originates in these sectors.

We believe that the Order falls short in five specific areas. Unless the FCC adequately addresses each of them, the rules adopted will not represent real Net Neutrality and will face unnecessary legal challenges.

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1. **Paid Prioritization:** Paid prioritization is the antithesis of openness. Any framework that does not *prohibit* such economic discrimination arrangements is not real Net Neutrality. Without a clear ban on such practices, ISPs will move forward with their oft stated plans to exploit their dominant position and favor their own content and services and those of a few select paying partners through faster delivery, relegating everyone else to the proverbial dirt road.

   The draft Order reportedly prohibits ISPs from engaging in "unjust and unreasonable" discrimination. But it does not explicitly single out paid prioritization as an example of unjust or unreasonable discrimination. This unacceptable loophole threatens to swallow the entire rule. The Commission's codification of the principle of nondiscrimination must clearly and unambiguously prohibit the harmful practice of paid prioritization.

   In announcing the circulation of his draft Order, Chairman Genachowski rightly noted that protecting the free market online means that users, not broadband service providers, must choose what content and applications succeed. In order to actually embody this belief, the final Net Neutrality rule must make it clear that paid prioritization will not be tolerated.

2. **Adequate Protections for Wireless:** Last fall, Chairman Genachowski stated: "It is essential that the Internet itself remain open, however users reach it." Unfortunately, the draft Order apparently leaves wireless users vulnerable to application blocking and discrimination. The draft order reportedly would only prohibit outright blocking of websites and competing voice and video telephony applications, but would not restrict other blocking, degrading or prioritization. This incomplete protection would destroy innovation in the mobile apps and content space, permanently enshrining Verizon and AT&T as the gatekeepers for all new uses of the wireless Web.

   The sole reason reportedly cited for not applying full Net Neutrality to wireless networks is engineering limitations. But to the extent that a particular network has legitimate technical differences, these can be addressed through properly defined reasonable network management practices.

   At the very least, the FCC must ensure its policy is consistent with the underlying rationale for disparate treatment. For example, if bandwidth constraints are the supposed justification for disparate treatment, 4G wireless networks should receive greater Net Neutrality protections, as they should be far less capacity-constrained than some existing DSL networks. To the extent that a particular 3G wireless network

is shown to require special treatment, it still should be subjected to a strict no blocking rule.

Furthermore, the FCC must prohibit all forms of economic-motivated discrimination on wireless networks. There is simply no reason for AT&T to allow its own remote DVR application to run freely on its wireless network, but to degrade all other streaming applications.

3. **Loophole-Free Definitions:** The draft Order's definition of Broadband Internet Access Service could easily be exploited by ISPs seeking to evade or exempt themselves from the rules. The Commission should not adopt unnecessarily broad definitions that will erode the protections the rule seeks to provide. The FCC should adopt the definition of Broadband Internet Access Service suggested in the October 2009 NPRM. The Commission should also adopt a definition of reasonable network management that ensures that traffic management is only used in a manner that is valid in proportion, means, geography and time. Reasonable network management cannot be a loophole used by network operators to evade the rules.

4. **Specialized Services Cannot Undermine the Open Internet:** The Verizon-Google pact announced last summer was met with a fierce public backlash in part because the deal would have allowed ISPs to split the public, open Internet into two "pipes." It created a carve-out from Net Neutrality rules for so-called "managed" or "specialized" services. The open Internet gives every startup the chance to turn a good idea into the next Google or Facebook. These specialized services would create a pay-for-play platform that would destroy today's level playing field.

   While some highly sensitive and truly specialized services might not be best provided over the open Internet, there is no reason for the FCC to create a specialized services loophole that would undermine Net Neutrality. Unfortunately, the draft Order apparently opens the door to specialized services without any safeguards. To ensure that specialized services do not undermine the open Internet, the FCC should study this matter further.

   At a minimum, if such services are permitted, they should be offered separately from Internet services; they should not replicate the functionality of services already available on the open Internet; they should not interfere with the bandwidth allocated for Internet access or degrade other applications or services; and they should not retard the growth of broadband Internet access service capacity.

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5. **FCC Broadband Policy Must Be Based on Sound Legal Footing:** Despite the U.S. Court of Appeals for the D.C. Circuit's rejection of the FCC's use of Title I ancillary authority in *Comcast v. FCC*, the chairman's draft reportedly attempts to find a new basis of authority using this strategy. This is an unnecessary risk, not only to the Net Neutrality rule, but to the FCC's entire broadband agenda. The FCC must restore its unquestionable authority to protect consumers, promote adoption and deployment, and serve the public interest in the broadband market.

In closing, NAMAC applauds the Commission's past efforts to codify the 2005 *Internet Policy Statement*. We urge you, as guardians of the public trust, to perform due diligence to ensure that any order will work in the best interests of the public for equitable access and speed for all Americans, regardless of ability to pay, to current and future broadband transmission networks be they wired or wireless.

Respectfully,

Jack Walsh
Executive Director